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EB 04-381

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FLORIDA CABLE
TELECOMMUNICATIONS
ASSOCIATION, INC.; COX
COMMUNICATIONS GULF
COAST, L.L.C., *ET AL.*

Complainants,

P.A. No. 00-004

v.

GULF POWER COMPANY,

AUG 09 2000

Respondent.

To: Cable Services Bureau

GULF POWER COMPANY'S MOTION
TO STRIKE

Dated: August 7, 2000

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SUMMARY

The Motion to Dismiss argued quite simply that the Commission lacked jurisdiction over this matter for two reasons: first, the Eleventh Circuit held in *Gulf Power II*¹ that the Commission lacks jurisdiction over Internet service providers; and, second, that the Petitioners' complaint and petition for a temporary stay rest purely on a challenge to the contractual right of Gulf Power to give notice of termination under its existing pole attachment agreements. Contract disputes are not decided by the Commission. In its Opposition, Petitioners have seen fit to reargue virtually their entire case, which prompts this Motion to Strike and compels Gulf Power to respond.

Petitioners' steadfast refusal to recognize the final and binding nature of the Eleventh Circuit's holding in *Gulf Power II* is inexplicable. Eleventh Circuit rules and case law make clear that "published opinions are binding precedent."² Petitioners' arguments that the non-issuance of a mandate and the filing of petitions for rehearing somehow place the decision in judicial limbo are dead wrong. **Eleventh Circuit rules state unequivocally that the "issuance or non-issuance of the mandate" has no impact on the binding nature of a published decision.**³ Case law further explains that a motion for rehearing is also irrelevant.⁴ The Ninth Circuit's ruling in *AT&T Corp. et al. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), and the Virginia District Court decision in *MediaOne Group, Inc.*

¹ *Gulf Power Co., et al. v. F.C.C.*, 208 F.3d 1263 (11th Cir. 2000).

² Eleventh Circuit Internal Operating Procedures, p. 109, attached as Exhibit 1.

³ *Id.*

⁴ *Vo Van Chau v. United States Department of State*, 891 F. Supp. 650, 654 (D.D.C. 1995).

v. Henrico, VA, F. Supp. 2d 712 (E.D. Va. 2000) should not change the result for -- a company situated within the Eleventh Circuit and a named plaintiff in *Gulf Power II*.

Petitioners' effort to shift the burden to Gulf Power to prove that every single Petitioner is carrying Internet service on "every node of every system" in FCTA fails. First, it is Petitioners' burden to establish jurisdiction, not Gulf Power's. Second, there is nothing in the *Gulf Power II* opinion suggesting that its application hinges upon 100% Internet saturation over "every node of every system." Instead, the Court held that the Commission "has no authority under the Act to regulate Internet service providers." If a cable company provides Internet service over one node in the State of FCTA, it is an Internet service providers, and this Commission lacks jurisdiction. Third, Gulf Power's submissions to this Commission more than adequately demonstrate that the majority, if not all, of the named Petitioners are in fact providing Internet services in FCTA.

Petitioners likewise improperly attempt to shift their "high" burden of proof onto Gulf Power. Moreover, even if Gulf Power were to have the burden of proof, it is submitted voluminous evidence in this proceeding that the Petitioners will by no means suffer irreparable harm.

Concerning the remainder of issues raised in the Opposition, Petitioners' "course of dealing" claim is nothing more than a contractual performance issue over which the Commission has no jurisdiction. Furthermore, if the Commission were to grant the Petitioners request for a stay (which it should not), the Commission must require Petitioners' to post an appropriate bond or establish an appropriate escrow account. Otherwise, the Pole Attachment Act, as applied in this case, will not provide "a reasonable, certain, and adequate provision for obtaining compensation" and will therefore effect an unconstitutional taking.

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**GULF POWER COMPANY'S MOTION
TO STRIKE**

Gulf Power Company ("Gulf Power"), by its counsel, moves to strike that portion of the "Opposition to Motion to Dismiss Complaint and Petition for Temporary Stay for Lack of Jurisdiction" ("Opposition") filed by the Alabama Cable Telecommunications Association and Comcast Cablevision of Dothan, Inc. ("Petitioners") which exceeds the issues raised by Gulf Power in its "Motion to Dismiss the Complaint and Petition for Temporary Stay for Lack of Jurisdiction" ("Motion to Dismiss").

I. Portions of Petitioners' Opposition Should Be Struck Because It Is a Prohibited Reply to Gulf Power's Answer to Petition for Temporary Stay

The Motion to Dismiss contained these arguments: that the Commission lacks jurisdiction over Internet service providers under the holding in *Gulf Power II*; that the

contractual right of Gulf Power to give notice of termination under its existing pole attachment agreements is a matter for resolution in local courts; and that Petitioners complaint was untimely.

In its Opposition, Petitioners address the merits of their complaint. They argue, for example, about the Commission's responsibility to regulate the Internet (Opp. at 14); the rates, terms and conditions contained in new pole attachment agreements Gulf Power has announced will be utilized in the event Petitioners mandate access (Opp. at 4); the unreasonableness of Gulf Power's seeking confidential treatment of its market sensitive financial data (Opp. at 3-4); perceived unilateral demands for extravagant pole attachment rent (Opp. at 3); alleged failure to bargain in good faith (Opp. at 4); and inferred threats to terminate attachments (Opp. at 5).

None of these arguments is germane to the question of whether the Commission has **jurisdiction** to hear the complaint and/or grant a temporary stay. Accordingly, those portions of the Opposition that address the substantive arguments of the complaint and request for temporary stay should be stricken. *New Continental B/casting Co.*, 51 RR 2d 266 [Rev. Bd., 1982]. In the event the Commission does not strike these arguments, however, Gulf Power submits its responses in the interest of contributing to the Commission's informed judgment.⁵

⁵ Concerning the issue of subject matter jurisdiction, it is axiomatic that "any statutory tribunal must ensure that it has jurisdiction over each case before adjudicating the merits, that a potential jurisdictional defect may be raised . . . by any party, at any stage in the proceedings, and, once apparent, **must be adjudicated.**" *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996) (emphasis added). As discussed below, if the Opposition is not struck, then the Petitioners' arguments pertaining to jurisdiction must be rejected on their own accord because they attempt to convince the Commission into erroneously exceeding the scope of its jurisdiction.

II. The Commission Lacks Jurisdiction Under *Gulf Power II*

A. The *Gulf Power II* Decision is Final

Eleventh Circuit rules and case law make clear that the *Gulf Power II* decision is final and binding authority.

The Eleventh Circuit's published Internal Operating Procedures state that:

"under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate **does not** affect this result. See *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992)."

See Eleventh Circuit Internal Operating Procedures, p. 109.

Eleventh Circuit case law adds that "[t]he fact that [parties have] petitioned for rehearing is . . . irrelevant." See *Vo Van Chau v. United States Department of State*, 891 F. Supp. 650, 654 (D.D.C. 1995); see also *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999) (reasoning that the court was "bound to follow prior panel decisions, except where they have been overruled either by an en banc decision of this Court or a decision of the Supreme Court").

Gulf Power is situated in the Eleventh Circuit. Gulf Power was a named party in both the *Gulf Power I* and *Gulf Power II* decisions. The *Gulf Power II* opinion is valid and binding on the Commission unless it is overruled or withdrawn.

B. Petitioners are Internet Service Providers

Petitioners assert that Gulf Power's jurisdictional argument is based upon the "**potential** of Petitioners' attachments to carry any Internet traffic." Gulf Power's motion is not based upon potentialities. Rather, Gulf Power has submitted irrefutable evidence to this Commission revealing the reality that Petitioners AT&T, Time Warner, Cable One,

MediaCom, and TCI are providing Internet service in Alabama. See Gulf Power's Motion to Dismiss at 3. ("**CCGC, Mediacom, and ComCast Provide Internet Services or Commingled Internet and Telecommunications Services**"). Gulf Power's evidence included the following documents (prepared by the Petitioners themselves) showing "linkage" to the State of Florida and Gulf Power's poles:

- Mediacom's brochure offer Internet service in Gulf Breeze, Florida;
- Cox Cable's brochure listing Florida address to contact to receive Internet service;

See Motion of Gulf Power to Dismiss Complaint and Petition for Temporary Stay, Exhibit 1. If Gulf Power's previous submissions are not already irrefutable evidence that the Petitioners are providing Internet service in Florida, Gulf Power has attached hereto: (1) ComCast brochures and photograph of billboard advertising Internet service with cable service through attachments to Gulf Power's poles (Attachment A to Second Affidavit of Michael R. Dunn); (2) Mediacom brochures and photograph of billboard advertising Internet service with cable service through attachments to Gulf Power's poles (Attachment B to Second Affidavit of Michael R. Dunn); (3) Cox advertising brochures and photographs of billboards advertising Internet service (Attachment C to Second Affidavit of Michael R. Dunn). See *also* Exhibit 1, Second Affidavit of Michael R. Dunn, ¶¶ 9, 10.

C. Gulf Power Does Not Have the Burden to Show That All Petitioners Are Providing Internet Service Over Every Node of Every System

Petitioners further make the misleading argument that "Gulf Power has made no showing that 'Internet' will be provided over every attachment to every customer." This argument suffers from (at least) two defects. First, the Court in *Gulf Power II* did not hold

that the Commission has jurisdiction unless the pole owner shows that Internet is "provided over every attachment to every customer;" rather, the Court held that the Commission "has no authority under the Act to regulate Internet service providers." 208 F.3d at 1276. As shown above, Gulf Power has shown that the named Petitioners, Cox, Mediacom, ComCast and the FCTA through its members, unquestionably are Internet service providers in Florida.

Second, the Petitioners attempt to improperly shift the burden of proof on this issue to Gulf Power. Judicial precedent clearly establishes that "[i]f either party raises a serious doubt about jurisdiction, the burden of proof is on the party asserting federal jurisdiction."⁶ In the instant proceeding, the Petitioners have unquestionably failed to prove that they are not Internet providers because they have not even attempted to submit any evidence refuting that discussed above that demonstrates that they are, indeed, providing Internet service. The only evidence that the Petitioners have submitted that is even relevant is the assertion that "no Internet is available on portions of Cox's Florida systems that are attached to Gulf Power's utility poles." Nevertheless, this statement seems to concede that Cox is an "Internet provider" (albeit not in Gulf's territory) over which the Commission has no jurisdiction pursuant to *Gulf Power II*. Furthermore, even if this statement is true and relevant, then the instant proceeding should be dismissed because other Petitioners are

⁶ *Selke v. New England Insurance Co.*, 2 F.3d 790, 792 (7th Cir. 1993). See e.g., *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) ("plaintiff bears the burden of proof that jurisdiction does in fact exist." In addition, the tribunal "must scrutinize the evidence submitted by [the Plaintiff] as support for its otherwise naked jurisdictional allegations" *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993).

unquestionably Internet service providers and are obviously providing that service within Gulf's territory.

D. The Commission Should Not Attempt to Exercise Jurisdiction

The Petitioners argue that the Commission should assert jurisdiction "to preserve the status quo" because of the "ongoing split in the circuits on the question of exactly how Internet services are to be regulated." This "shoot first and ask questions later" approach to jurisdiction has it backwards. The FCC is not a body of unlimited power that is to independently go forth and regulate the unregulated:

"[I]t goes without saying that the bald assertion of power by [an] agency cannot legitimize it." "Unable to link its assertion of authority to any statutory provision, the [FCC's] position in this case amounts to the bare suggestion that it possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area. We categorically reject that suggestion."

Comset Corporation v. F.C.C., 114 F.3d 223, 227 (D.C. Cir. 1997) (citations omitted); see *Judge v. Allentown and Sacred Heart Hospital Center*, 467 A.2d 899, 901 (Pa. Commw. Ct. 1983) ("A doubtful power does not exist, however, and an agency must act within the strict and exact limits as statutorily defined.") *rev'd on other grounds*, 487 A.2d 817 (Pa. 1985). Stated differently, the FCC's duty to regulate cable and telecommunications attachments "does not subsume the discretion to act under other, wholly different, circumstances, unless the statute bears such a reading."⁷ *Mobile Communications Corp. of America v. F.C.C.*, 77 F.3d 1399, 1413 (D.C. Cir. 1996) (Edwards, C.J., concurring in part and dissenting in part) (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)).

⁷ As to Gulf Power and the FCC, the Eleventh Circuit has unquestionably held that the statute does not "bear" the reading advocated by the Petitioners.

Accordingly, unless the FCC clearly has the authority to regulate Internet services (which, in light of *Gulf Power II* it does not), it should not attempt to unilaterally broaden the scope of its jurisdiction in this proceeding.

Furthermore, even if the Commission were to have the authority to unilaterally broaden its jurisdiction to regulate “gray” areas, doing so in this case would be bad policy. Assumption of jurisdiction over a matter that a court has already held would be inappropriate in the hope that the ruling might later be overruled or reversed would likely only result in an excessive waste of resources pursuing futile proceedings. See *City of Lafayette, Louisiana v. S.E.C.*, 454 F.2d 941, 953-54 (D.C. Cir. 1971) (recognizing the wisdom of an agency deferring action on a matter until a pending case is determined by a court).

Jurisdiction must also fail because the Petitioners have not adhered to the condition precedent that it engage in negotiations with Gulf Power before filing a complaint with the Commission. Under § 224(b) the parties are required to negotiate the terms of the attachment before requesting the Commission to intervene in the dispute. However, in these proceedings, the Complainants have failed to engage in meaningful negotiations with Gulf Power despite Gulf Power’s attempts to do so. (Exhibit 1, Second Affidavit of Michael R. Dunn, ¶¶ 3-5). Indeed, the Complainants have expressed no intent to discuss paying just compensation for their taking of Gulf Power’s property. *Id.* For this reason, the Commission should not exercise jurisdiction over this complaint proceeding.

The FCC cannot and should not assert jurisdiction over this matter.

II. Petitioners Have Failed to Establish That They Will Suffer Irreparable Harm

In their Opposition, the Petitioners again attempt to shift the burden of proof to Gulf Power with regard to the issue of irreparable harm. As with subject matter jurisdiction, judicial precedent is clear not only that the party requesting the stay bears the burden of proving that it will suffer such damages, but also that petitioner's burden of proof is high. *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983). Rather than proving anything, the Petitioners merely restate their bare allegations of doom and gloom that when analyzed, do not even make sense. For example, their unsubstantiated allegation that having to pay their fair share for pole attachments will reduce their ability to provide new and expanded services cannot be deemed irreparable harm under any construction of those terms. Indeed, courts have long recognized that mere economic loss is not enough. See, e.g., *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Second, even if Gulf Power were to have the burden of proof (which it does not), the alleged irreparable harm has been adequately refuted. In particular, the Commission should refer to the voluminous materials in Gulf Power's Answer to Petition for Temporary Stay as well as the Answer to Complaint⁸ filed by APCO in a similar proceeding demonstrating that publicly available information firmly establishes that: pole attachment expenses, even if increased 500%, comprise a minuscule part of a cable company's total operating expenses; cable companies and rate increases are synonymous, with such rate increases greatly outpacing inflation for almost every year that cable service has even

⁸ Gulf Power incorporates herein by reference those portions of APCO's Answer to Complaint dealing with Petitioners' allegations of irreparable and all appropriate attachments.

existed; cable companies have the wherewithal to engage in multi-billion dollar expansions; and that claims about potential loss are greatly exaggerated, with the Commission itself recognizing only this year that "DBS exerts only a **modest** influence on the demand for cable service."⁹ See Gulf Power's Answer to Stay at 14-19, Exhibits 4, 5, 6, and 7; APCO's Answer to Complaint, 20-28, Exhibits D-L. Furthermore, with regard to their bare allegation that more appropriate pole attachment charges will drive small cable companies out of business, Gulf Power submitted evidence that small telephone companies have always been able to pay more appropriate pole attachment charge without having to going bankrupt. Gulf Power's Answer to Petition for Temporary Stay at 18, n. 13.

Third, the Complainants are not irreparably harmed by the attachment price as they claim in their Opposition because the increased cost would not amount to a significant increase in customers' cable prices even if they passed on 100% of the increase. (Exhibit 1, Second Affidavit of Michael R. Dunn, ¶¶6-7). The methodology used to arrive at the \$1.02 increase per customer if the Complainants pass 100% of the increase on to customers is thoroughly explained in Michael R. Dunn's First Affidavit (attached as an exhibit to Gulf Power's Motion to Dismiss) and is again explained in Michael R. Dunn's Second Affidavit (Exhibit 1 hereto). This small increase in cable rates will not cause Complainants to lose customers, and thus Complainants will not suffer irreparable harm and is not entitled to a stay.

Accordingly, the Petitioners have failed to carry their high burden of proof to establish that they will suffer irreparable harm.

⁹ *Report of Cable Industry Prices; Statistical Report on Average Rates for Basic Service, Cable Programming and Equipment*, 200 WL 767685, *7 (June 5, 2000).

III. The Commission Lacks Jurisdiction Over Petitioners' Contractual Claims

The issue raised by Gulf Power's Motion to Dismiss is whether or not the Commission has jurisdiction to hear and decide the Petitioners' complaint and request for temporary stay. While the Commission certainly has jurisdiction over the rates, terms and conditions of pole attachment agreements under Section 224 of the Communications Act, the Commission has traditionally refused to step in where the dispute between the parties involved performance under the contract between the parties. *See, e.g., Tele-Ception of Winchester, Inc. v. Kentucky Utilities Co.*, 49 RR 2d 1572 (FCC has no jurisdiction over counter claims for unpaid rents under a pole attachment agreement) and *Texarkana TV Cable Co. v. Southwestern Electric Power Co.*, 49 RR 2d 1043 (Commission is not empowered by Section 224 of the Act to adjudicate the extent of a party's contractual obligations or to determine the legal impact of a party's failure to fulfill its contractual obligations; such matters are left to state law governing breach of contract.)

Prior to 1996, pole attachment agreements were entered into voluntarily. It was only in the Telecommunications Act of 1996 that access to utility poles was made mandatory. The contracts in question here predate 1996. Voluntary commercial agreements commonly contain clauses relating to the term of the agreement, expiration of the contract, and termination upon the occurrence of certain events, such as default or notice by either party. Petitioners contest Gulf Power's action on the basis of an asserted "course of dealing." Nothing about this disagreement is in any way unique to or even related to the rates, terms and conditions of pole attachments. Rather, this is about voluntary agreements expiring or the exercise of ordinary termination clauses, both of which are

common to any commercial contract. The Commission should see past Petitioner's attempts to leapfrog the basic question and dismiss the complaint and request for stay.

IV. The Commission Lacks Jurisdiction to Grant a Stay Without Requiring a Bond or Establishing an Escrow Account

As a final argument, Petitioners attempt to convince the Commission not only to grant their request for temporary stay, but to do so without requiring Petitioners to post a bond or establish an escrow account to cover the likelihood that they will be forced to pay more than the subsidized pole attachment rate. Gulf Power emphasizes that the Commission lacks jurisdiction to take this requested action because doing so would constitute an unconstitutional taking of Gulf Power's property.

An important holding in the *Gulf I* decision was that judicial review of any FCC rate determination would "ensure that the utility is not required to provide access to its property at a rate that does not provide just compensation." *Gulf Power Co. et al. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999). This holding was premised on the understanding that Gulf Power would not be required to provide access to its facilities for a fee less than what Gulf Power deemed to be just compensation until a judicial determination of just compensation was made. Indeed, the *Gulf Power I* Court, by order issued March 5, 1999, requested that the parties answer the following question:

Does 47 U.S.C. section 224, or any regulation issued pursuant to that provision, require a utility to provide access to its poles, ducts, conduits, or rights-of-way at a rate below which the utility considers to be just compensation at any time prior to a court determining the just compensation for that access?

In response, the Commission (through the Department of Justice) and the Petitioners both replied that a pole owner would not be required to provide access at a rate below what the

owner considers to be just compensation until judicial review is made because the Commission would stay the operation of any of its orders that might attempt to reduce that charge. See Exhibits 2 and 3 to Gulf Power's Answer to Petition for Stay. In the instant proceeding, the Petitioners have now flip-flopped and argue that the Commission should instead stay Gulf Power's charge even before a Commission determination.

As noted in Gulf Power's Answer to Complaint, the Petitioners should be judicially estopped from taking these inconsistent positions. See *e.g. Chandler v. Samford University*, 35 F. Supp. 2d 861, 863 (N.D. Ala. 1999) (noting that judicial estoppel "precludes a party from assuming a position in a legal proceeding inconsistent with one previously asserted when inconsistency would allow the party to 'play fast and loose with the courts'"); see also *Morrow v. City of Birmingham*, 926 F. Supp. 1033, 1040-42 (S.D. Ala. 1996), *aff'd*, 117 F.3d 508 (11th Cir. 1997) (applying one judicial estoppel doctrine to bar the city from asserting a defense at such a late stage in one proceeding that doing so constituted a contrary position); *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995) (barring government from asserting an inconsistent FOIA argument from one asserted in previous judicial proceeding).

But perhaps even more importantly, the Commission lacks jurisdiction to issue the Petitioners' requested stay without first providing some mechanism to ensure that Gulf Power will be provided just compensation if and when a court determines that just compensation in this case exceeds the subsidized, cable rate. The Court asked the parties to respond to the foregoing question for a reason - - it was trying to determine whether a "reasonable, certain, and adequate provision for obtaining compensation exist[s] at the

time of the taking.” 187 F.3d at 1331 (quoting *Williamson County Regional Planning Com’n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)). Otherwise, 47 U.S.C. § 224 would fail to provide just compensation. *Id.* The Court was obviously concerned that if the pole owner were forced to provide access at a rate below what the owner considers to be just compensation prior to a judicial determination, then the Court might lack any mechanism to order the cable company to pay just compensation if that constitutional price exceeds the Cable Rate because there is no express statutory mechanism allowing the court to order a retroactive surcharge. Predicated upon the representations made by the Commission and the Petitioners, the Court held that such a reasonable process existed because there was no need for such a surcharge mechanism since the owner would never have to allow access at a rate it does not deem appropriate (at least not until the constitutionally required judicial determination of just compensation is made).

Accordingly, if the Commission were now to grant the stay without providing any mechanism (such as a posting of bond or establishing an escrow account) to ensure that just compensation will be provided if it exceeds the Cable Rate, then 47 U.S.C. § 224 will not provide a “reasonable, certain, and adequate” process for providing just compensation. Therefore, if the Commission were to grant a temporary stay (which it should not for the reasons discussed above), then it constitutionally must require the posting of an appropriate bond or the establishment of an appropriate escrow account.¹⁰

¹⁰ In their Opposition, Petitioners also make the brazen statement that they only received notice of Gulf’s intention to change pole attachment fees a mere four days before they filed their Petition for Temporary Stay. This statement is groundless. As explained in Gulf’s Motion to Dismiss, the Petitioners received written notice well before June 25, 2000 that Gulf intended to implement “an increase in pole attachment rates,” as contemplated by 47 C.F.R. § 1.1406(c)(2). Motion to Dismiss at 6-8.

CONCLUSION

For the foregoing reasons, the Opposition is due to be struck. In the alternative, each of the arguments made by the Petitioners therein are due to be rejected on their own accord.

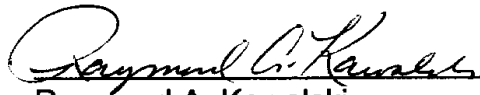
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DATED: August 7, 2000

CERTIFICATE OF SERVICE

I, Cassandra Hall, a secretary in the law firm of Keller and Heckman LLP, certify that I have served a copy of this Motion to Strike upon the following on this the 7th day of August, 2000:

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